IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1298

GEORGE GILMER AND JAMES JACKSON,
Petitioners,

vs.

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION, LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that there was not substantial evidence that the NLRB balanced the rights of employees to engage in concerted activities against the legitimate business needs of the employer, that the NLRB failed to consider all of the relevant facts, and that the employees were not discharged for engaging in concerted activities but for continual flouting of the employer's rules, for engaging in personal business during work time and for insubordination?

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COUNTERSTATEMENT OF THE FACTS

In their factual background petitioners ignore crucial facts considered by the Seventh Circuit. As emphasized by the Court "this case does not involve an employer engaged in anti-union activity, nor does it involve employee dismissal for attempted union organizing" (A-5). Initially ignored is the fact that Jackson and Gilmer had both been "remiss in their duties," that the executive board of the union had recommended that they be fired, but the employer's chief executive instead issued them a written warning that if their performance did not improve, they would be discharged (A-3,15).

Shortly after this warning, they ignored the known established procedure of bringing wage increases to the attention of the secretary-treasurer or the board and interrupted a stewards' meeting by bringing up their requests for wage increases, (A-6,12).[1]

After the meeting, petitioners again disregarded the employer's known rules by using the employer's car radios to discuss their attempts to obtain wage increases (A-6,12).

Petitioners were warned the next morning about these violations and were told if their performance improved they would be given wage increases (A-6).

Six days later, they attended a political rally of several thousand persons honoring Mayor Bilandic on working time and in disregard of established procedures passed out wage complaints to some members of the board (A-6;14). Prior to the luncheon they distributed copies at the employer's office to other board members (A-14) and offered no explanation why it was necessary to pass out the letters at the luncheon instead of passing them out at the office or mailing them (A-6).[2]

Following the luncheon, the executive board reviewed all of the events, the poor performance, the interruption of the stewards' meeting, the improper use of the car radios, the Mayor Bilandic luncheon incident and discharged them.

The Administrative Law Judge (hereinafter ALJ), while finding that the car radios were improperly used, concluded that while "Gilmer and Jackson may not have been the most satisfactory of employees . . . [they] would not have been fired but for these two incidents" (A-15). The ALJ did not consider the improper use of car radios as a reason for their discharge, nor did he consider the employer's business needs or justification in having its rules obeyed.

The Seventh Circuit in refusing to enforce the Board's order considered all of the facts, including the use of car radios, questioned whether the ALJ and the NLRB had engaged in any

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1. The "only purpose of these stewards meetings is to discuss the ongoing administration of the contract shops" (A-12).

2. Petitioners again fail to inform this Court that they were on working time, acting as representatives of the employer when they attended the luncheon.

balancing process and held: "we do not find substantial evidence that they engaged in the required balancing process. That wage demands were made does not conflict with a dismissal for poor performance, for personal business during working time, and for insubordination. The balancing process requires more than a talismanic approach based on the mere articulation of a wage demand" (A-5).

REASONS FOR DENYING THE WRIT

The Court in weighing all the facts balanced the competing interests which the Board failed to do in concluding that the right to engage in concerted activities must be balanced against the legitimate business interest of the employer and that employees who continually choose to flout the rules after being warned are subject to discharge. The decision is in harmony with decisions of other circuits, and raises no policy questions.

Not infrequently a reviewing court refuses to enforce a Board order because of the absence of substantial evidence due to the failure of the Board to consider all of the facts in the whole record.[3] All of the facts relevant to the court decision had been credited by the ALJ but the ALJ who while finding that petitioners in disregard of their employer's known order used car radios to discuss their wage demands ignored such violation in determining whether the discharges were violative (A-12).[4] He improperly concluded that they had been discharged only because of an incident involving the stewards' meeting and the Mayor Bilandic luncheon. "I am satisfied that Respondent would not have fired them except for these two incidents" (A-15).

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3. In *NLRB v Enterprise Association of Steam, Hot Water, Hydraulic Sprinklers, Pneumatic Tube, Ice Machine and General Pipefitters of New York, Local No. 638*, 429 US 507, the Court observed "nor is it the case that the Board in applying its control standards failed to consider all of the relevant circumstances . . . or ignored any material circumstances" *id.* at 524. Enforcement denied: *NLRB v Whitfield Pickle Co.*, 374 F2d 576 (5th Cir 1967)—testimony arbitrarily disregarded; *American Mfg. Associates v NLRB*, 594 F2d 30 (4th Cir 1979)—no attempt of Board to justify a disregard of uncontroverted evidence; *Liberty Mutual Insurance Company v NLRB*, 592 F2d 595 (1st Cir 1979)—Board ignored testimony and disregarded employer's business justification for discharge; and *NLRB v Knuth Brothers*, 537 F2d 950 (7th Cir 1976)—Board ignored the impact of the company official's anger and the disastrous effect of the employees' conduct on the employer's operation.

4. An officer of the employer overhearing petitioners discussing their wage demand over the radio interrupted them by saying, "why don't you cut this out. This is no place to talk about anything like that on the air wave. There are other truck lines . . . other companies on the same air waves at this time of night. Cut it out . . . if you have any problems go see the old man" (NLRB Tr.p.187).

The improper use of the radio was crucial to the court's rationale, for this conduct constituted a link in a series of acts which violated the employer's known rules. Unlike the ALJ who ignored the radio incidents and considered the other incidents as being unrelated, and the Board which *pro-forma* adopted the ALJ's decision, the Court correctly viewed all of the events as being part of a panaroma in concluding that:

> The Union "went along," but with a warning, after the earlier discussion of poor performance. It "went along," but with a reminder of impropriety, after the stewards meeting. It went along after the CB radio warning. The luncheon event was the final straw. An employer should not be penalized for good-heartedness with employees who choose to flout its rules and ignore its warnings (A-7).

The Court after weighing all of the relevant facts followed the teaching of this Court by recognizing that "the ultimate problem is the balancing of the conflicting legitimate interest . . ." *NLRB v Truck Drivers Local Union No. 449, Int. Brotherhood of Teamsters,* 353 US 87.

The Court while recognizing the right of employees to engage in concerted activities to present wage demands observed: "nor can it be said that a mere characterization as related to wage demands requires a total disregard of the time, place, and manner in which the demands were made, or of the job performances of the dismissals," (A-5).

Petitioners, as the court noted, were not discharged after the stewards' meeting on April 5, or after the improper use of the car radios but were given another chance to comply with known rules and procedures and it was only after they again violated such rules at the Bilandic luncheon that they were discharged.

The argument that they attempted to follow the employer's procedures, however vaguely defined is not supported by the evidence.

The procedures which were disregarded by petitioners were found by the ALJ to be clear: (1) "the only purpose of the stewards meeting is to discuss the ongoing administration of the contract shops" (A-12); (2) Gilmer and Jackson were remiss in us[ing] the two-way telephones in the Union's cars for personal conversation (A-12); and (3) that they were directed to attend the

Mayor Bilandic Luncheon in their official capacity as representatives of the employer (A-14). The evidence disclosed that Jackson and Gilmer who were long term employees were aware that the established procedure was to ask the chief executive officer for a wage increase and in the past they had followed this procedure. Don Heim, a member of the executive board, told them "go into the front office just like I do. Get a private audience with Mr. Peick, speak your peace [sic] there" (A-28).

All that the court concluded was that employees who had been warned for poor performance and threatened with discharge, who had improperly interrupted a stewards meeting to bring up personal wage demands, who had improperly used the employer's car radios to discuss their wage demands, who had been warned about such conduct and who while on working time in their official capacity attended a political luncheon and improperly distributed wage letters are subject to discharge as a result of the totality of their conduct.

Petitioners were not acting at their peril, but were discharged on the third occasion when they deliberately violated known rules and used working time for their own purposes.

The Court correctly observed that after the third violation, the employer was justified in discharging them and that "the wage demand element in those actions [did not] influence the dismissals so as to achieve 'but for' status [and that] the NLRB failed to consider the legitimate business interest of the [employer] or to balance the employees right to petition against the employer's right to performance of assigned duties in a loyal manner," (A-5;7).

The Board instead of engaging in a true balancing evaluation held that the employees would not have been discharged except "but for" their activity. The failure to even refer to, let alone consider, the employer's business needs not to have its meeting interrupted by employees making wage requests, not to have its car radios used for such purposes, as well as not to have letters distributed at a political luncheon, is proof that the Board failed to accomplish the delicate task of "weighing the interest of employees in concerted activities against the interest of the employer in operating his business in a particular manner and of

balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *NLRB v Erie Resistor Corp.*, 373 US 221, 229. The Court concluded that "whatever balancing process may or may not have been here performed by the ALJ and the NLRB, articulated or *sub silentio*, we do not find substantial evidence that either engaged in the required balancing process" (A-5).[5]

The instant case represents no significant policy change and is only of future academic interest since the Board in the recent decision in *Wright Line, Inc.*, 251 NLRB No. 150, 105 LRRM 1169 (1980), has rejected the simplistic "but for" test in apparent agreement with the Court's conclusion that "the balancing process requires more than a talismanic approach based on the mere articulation of a wage demand" (A-5).[6]

Petitioner's reliance on *NLRB v Washington Aluminum*, 370 US 9, is misplaced. Those employees walked out because of bitterly cold conditions. This Court refused to "accept the Company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable 'cause' for discharging these employees" (*Id.* at 16).

Absent a contract restriction, employees obviously are free to engage in a strike at will and any rule which limits such a right is violative.

Here there was no walkout. All that was involved were employees who insisted that they had a right to interrupt an

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5. It can be argued that the ALJ and the Board decision were departures from the Board's traditional practice since in a subsequent decision, the Board in an extensive review of the test required in 8(a)(3) cases commented: "the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so the inquiry then focuses on whether any 'legitimate business reason' asserted by the employer is successfully proven to be the cause of the discharge to negate the General Counsel's showing of prohibited motivation. *Wright Line, A Division of Wright Lines, Inc.*, 251 NLRB No. 150, 105 LRRM 1169.

6. In *Wright Line, supra*, the Board adopted the causality test enunciated in *Mt. Healthy City School District Board of Education v Doyle*, 429 US 274, since the "Mt. Healthy procedure accommodates the legitimate competing interests [of the parties] . . ." 105 LRRM at 1174.

employer's meeting to raise the subject of wage increases, to improperly use company radios to discuss wage increases and after having been warned again, breached a known rule by distributing letters while on working time at a citywide political meeting. *Washington Aluminum* does not stand for the proposition that an employee is not subject to discharge if he continues to violate rules which limit working time for work. Unlike *Washington Aluminum*, the employer had a known procedure under which employees desiring wage increases had an opportunity to present such demands to the chief executive officer or to the union's executive board. Complying with such procedures did not interfere with concerted activities, but only permitted the employer to operate its business in accordance with reasonable rules.[7]

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7. When an employer has unilaterally established a mechanism for advancing employees' Section 7 rights, as opposed to establishing one pursuant to collective bargaining, the accomodation of the competing interests must shift in favor of the employer. *Advance Industries v NLRB.*, 540 F2d 878, 885 (7th Cir 1976). Employees cannot insist that their demands be met in the middle of a workday when the employer has promised to deal with them at day's end. *NLRB v Condenser Corp.*, 128 F2d 67 (3rd Cir 1942).

CONCLUSION

For all of the foregoing reasons, Respondent, Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America prays that the petition be denied as raising no issue warranting the Court's review.

Respectfully submitted,

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